

Treaty Indian Tribes And The ESA

Introduction

The federal Endangered Species Act (ESA) is the United States' most powerful tool to prevent species extinction. The ESA gives federal entities the ability to regulate and even halt activities detrimental to the continued survival or recovery of a weak stock, giving that species an opportunity to rebuild.

While the ESA offers a promise of protection and restoration of endangered or threatened fish, wildlife and plant species that are important aspects of tribal religions, cultures and economies, it also poses a threat to tribal sovereignty and treaty rights.

ESA issues affecting tribes arise in the context of on-reservation resource management and tribal development activities, as well as off-reservation resource management issues, including the exercise of treaty-reserved fishing, hunting, and gathering rights.

There are currently four salmonid populations in western Washington with ESA protection: Puget Sound chinook, Hood Canal/Eastern Strait of Juan de Fuca summer chum, Lake Ozette sockeye and Puget Sound and Washington coastal bull trout are listed as threatened. This March, the U.S. Fish and Wildlife Service (USFWS) is expected to add southwest Washington and lower Columbia River cutthroat trout to the list of threatened species in our state. The status of coho is currently under review, and it is uncertain when any listing recommendations will be made.

These listings, particularly Puget Sound chinook and bull trout, will mark one of the first times the ESA has been implemented in a large metropolitan area.



Tribal biologists place artificial salmon nests in the Skagit River to study effects of flooding on salmon egg survival.

The Tribes And ESA

Western Washington Indian tribes have a unique place in the ESA issue. The tribes signed treaties with federal government representatives in the 1850s that guaranteed them the continued right to fish in all usual and accustomed places in exchange for the peaceful non-Indian settlement of most of the land west of the Cascade Mountains.

Those treaties were ignored or forgotten for decades, and it wasn't until the 1974 Boldt Decision (*U.S. v. Washington*) that the tribes were re-established as co-managers of salmon and steelhead resources in western Washington.

The courts – including the United States Supreme Court – have ruled that the tribes are entitled to half of the harvestable surplus of salmon and steelhead in western Washington. Treaty fishing is a right; all other fishing is a privilege. Along with this right comes the responsibility of managing treaty-reserved resources.

The tribes already have adjusted treaty-reserved activities because of weak stocks and to protect ESA-protected species. Gillnet fisheries for sockeye salmon in the San Juan Islands have been altered to reduce the potential impact to the threatened marbled murrelet, a robin-sized sea-going bird that can become entangled in fishing gear. Coastal fisheries, in which tribes

participate, have been reduced to lessen impacts on migrating Snake River chinook, which are protected under the ESA.

Fisheries in Puget Sound that harvest chinook have been drastically reduced in recent years, consistent with the poor productivity of Puget Sound chinook stocks. Also, tribal fishing opportunities in Hood Canal for chinook and coho have been substantially reduced to avoid bycatch of severely depressed summer chum populations.

Some tribes with forestry programs have reduced on-reservation timber harvests to preserve habitat for the endangered northern spotted owl, which, like the marbled murrelet, relies on old-growth timber for survival.

Because tribes have always depended on natural resources for their economic, cultural and spiritual survival, they have become increasingly concerned with the ESA as the list of protected species continues to grow.

In the past, tribes have expressed concern that insensitive federal administration of the ESA has interfered with the exercise of treaty rights, the development and management of natural resources, and the practice of traditional religions and ceremonies.

Joint Secretarial Order On Tribal Rights, Federal Trust Responsibilities And The ESA

In 1996, facing the likely re-authorization of the ESA, treaty Indian tribes from throughout the United States began working with the federal government on an administrative policy that would harmonize the ESA with treaty-reserved rights and resources. In June 1997 the secretaries of Commerce and Interior signed a secretarial order to “reconcile” the special relationship between treaty Indian tribes, the federal government and the ESA, and addressing tribal rights and the federal government’s trust responsibility.

The order recognizes tribal sovereignty and provides the framework within which the tribes and federal government can work cooperatively to harmonize treaty rights with the ESA.

“Indian lands are not federal public lands or part of the public domain, and are not subject to federal public land laws. They were retained by tribes or were set aside for tribal use pursuant to treaties, statutes, judicial decisions, executive orders or agreements. These lands are managed by Indian tribes in accordance with tribal goals and objectives...,” the order states.

Specifically, the order calls for a government-to-government working relationship between federal agencies and the tribes that will:

- Promote healthy ecosystems;
- Recognize the tribes as the appropriate entities to manage Indian lands and resources;
- Support tribal measures that preclude the need for conservation restrictions; and
- Be sensitive to Indian cultures, religions, and spirituality.

Further, the secretarial order says the federal government “shall give deference to tribal conservation and management plans for tribal trust resources that govern activities on Indian lands and address the conservation needs of the listed species.”

In recent years the tribes have been working with USFWS and National Marine Fisheries Service (NMFS) to develop specific working relationships that fulfill the intent of the secretarial order to “harmonize” tribal rights, federal trust responsibility, and the ESA.

The tribes met many times in 1999 with the federal agencies at the regional and local level to discuss implementation of the secretarial order. In addition, the tribes have been very active in tracking and participating in NMFS and USFWS processes, including final species listing decisions, development of protective regulations – also known as 4(d) rules – and in formal consultations.

4(d) Rules

One way to achieve the objectives laid out in the secretarial order is through Section 4(d) of the ESA. This section allows federal agencies to adopt regulations that will provide for the conservation of listed species. These regulations can be applied to management and conservation plans that NMFS finds to be protective of the listed species. Section 4(d) rules essentially allow actions taken pursuant to an acceptable recovery plan to be exempt from ESA take prohibitions.

In 1999 the tribes and NMFS formed a small working group to develop a set of 4(d) rules under the ESA that would allow NMFS to acknowledge salmon recovery plans developed by the tribes or by the tribes and the state, which will lead to the recovery of listed species. NMFS has two draft 4(d) rules that were formally proposed for adoption in late 1999.

Efforts to develop management and recovery plans are currently under way for Puget Sound chinook, Hood Canal / Eastern Strait of Juan de Fuca summer chum and Lake Ozette sockeye, and are expected to be available for consideration as 4(d) rules in early 2000. Work on a comprehensive coho management and recovery plan also has been in progress for a number of years.

Tribal Intervention

From the tribal perspective, the ESA must do more than merely prevent extinction of fish, wildlife and plants by preserving remnant populations that are really little more than museum specimens. The ESA must restore these populations to healthy levels that may again support harvest.

The tribes have seen many streams lose their salmon runs, and they have refused to wait for federal government intervention before taking action. Steps have already been taken to strengthen and restore salmon populations in western Washington. Restoring fish – and fish habitat – has been a major tribal goal for many years.

In particular, the tribes have voluntarily made several time, place, and manner restrictions in treaty-reserved salmon fisheries in certain areas where protected species could be present. The tribes, as good resource managers carrying out their management responsibilities under the *U.S. v. Washington* federal court case, have always structured their fisheries based on a weak-stock management approach. They work to develop fishery regimes that will have the least impact on the weakest stocks while maximizing harvest opportunity on stronger wild and hatchery stocks.

The tribes, working with WDFW, have also been reassessing their hatchery programs and modifying them to ensure they have no adverse impact on wild salmon populations.

They have also taken the lead on key salmon recovery efforts such as the Wild Stock Restoration Initiative, and key habitat protection initiatives such as the Timber/Fish/Wildlife Agreement, and many others.

Wild Stock Restoration Initiative

State and tribal leaders came together in the early 1990s to develop the Wild Stock Restoration Initiative in response to the poor condition of some salmon stocks and the possibility of ESA listings of some wild salmon stocks in western Washington.

The co-managers first developed an inventory of all salmonid stocks and their health. This systematic, scientific approach to the issue of declining fish runs has given the co-managers a wealth of information on the condition of the health of every salmon and steelhead stock in the state, and clearly identifies those fish stocks that need immediate help. Data collection took several years, but the Salmonid Stock Inventory is an invaluable tool for beginning restoration efforts.

The next step in the initiative is an inventory of habitat conditions. The Salmon and Steelhead Habitat Inventory Assessment Project gives managers a complete assessment of the effects of habitat loss and degradation in crucial watersheds on the health of all wild stocks.

Through the Wild Stock Restoration Initiative, the tribes are now defining management goals and objectives for fisheries and developing both regional and watershed specific recovery plans.

On-the-ground examples of cooperative recovery efforts are already showing results. A tribal/state/federal effort to rebuild extremely low Hood Canal wild summer chum salmon stocks has resulted in improved returns for several years in a row. This has been accomplished through a combination of hatchery supplementation and extremely restrictive fisheries regulations that have precluded much of the tribes' opportunity to fish on healthy coho and chinook stocks.

While much remains to be done, this demonstrated ability to cooperatively rebuild weak stocks is an important lesson for federal, tribal and state fisheries managers. It shows everyone that working together in the best interest of the resource is the best way to accomplish our goals.

Regional or watershed initiatives are at the heart of the wild stock recovery planning efforts supported by the tribes. The tribes are heavily involved in local watershed planning projects. The projects have clearly defined policy objectives that possess the necessary flexibility to implement performance measures and action strategies in light of location conditions.

Comprehensive species planning is just one example of how the tribes and state are responding to the needs of wild salmon in western Washington. Since 1997, the co-managers have been developing a comprehensive Puget Sound chinook management plan to maintain and restore wild stocks in a manner that reflects the region's fisheries objectives, production constraints and production opportunities.

Changes have already been proposed – and in some areas, already made – in annual harvest management. This consists of setting total fishery exploitation rates that are consistent with the current productivity of key Puget Sound wild chinook populations. This approach is intended to work in concert with freshwater habitat improvements to optimize production capability.

Conclusion

The tribes believe the ESA can be administered in a manner that prevents species important to tribal communities from becoming extinct, and can be administered in a manner that reaffirms federal trust responsibilities, treaty-reserved rights, and tribal sovereignty.

The tribes believe the ESA should have a standard of salmon stock recovery that not only saves species from extinction, but also allows for treaty-reserved harvests. Fish and wildlife resources and the ecosystems on which they depend must be managed in a holistic manner that recognizes that all things are connected.

Results of the Wild Stock Restoration Initiative – and the many ongoing efforts of the tribes and state to address the decline of wild salmon stocks – are figuring prominently in the ESA decision-making process.

For More Information

For more information about the natural resource management activities of the treaty Indian tribes in western Washington, contact the Northwest Indian Fisheries Commission, 6730 Martin Way E., Olympia WA., 98516; or call (360) 438-1180. Visit the NWIFC home page at www.nwifc.wa.gov.